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IN THE SUPREME COURT OF THE UNITED STATES

October 1982 Term

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioner

v.

ROSCOE L. EGGER, JR., COMMISSIONER OF THE INTERNAL REVENUE SERVICE and THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW

1. Is the tribal government of a treaty Indian tribe exempt, as are all state and local governments, from federal excise taxes on diesel fuel, propane, truck parts and the use of highway trucks? The apparent intent of Congress was that governmental entities would not be subject to these excise taxes; however, the Internal Revenue Code provisions in question did not mention Indian tribes or tribal governments, thereby creating an ambiguity as to the intended tax treatment of tribes and tribal governments. Is plaintiff, a treaty tribe, implicitly included within the governmental entity exemption?

2. Plaintiff Tribes' principal economic asset is the timber located on the reservation, title to which is held in trust by the United States pursuant to the 1855 treaty. That treaty obligated the

United States to provide plaintiff Tribes with a sawmill, equipment, training and the other means necessary to make productive use of the timber. The diesel fuel, propane, truck parts, and truck highway use on which the IRS seeks to tax plaintiff Tribes were used in plaintiff Tribes' timber enterprise in connection with the harvest and sale of reservation timber. Is the imposition of these taxes in violation of the treaty and trust obligations assumed by the United States pursuant to the treaty?

3. Virtually all aspects of the growth, harvest and sale of tribal timber resources, including the allowable annual harvest, the setting of stumpage prices and disposition of the proceeds, are controlled and managed by the federal government pursuant to acts of Congress and pervasive regulations of the Department of the Interior, Bureau of Indian

Affairs. Is the imposition of excise taxes on the Tribes' means of production incompatible with this pervasive federal regulatory scheme, and beyond the authority delegated to the Internal Revenue Service?

4. After the decision of the lower courts in this case, Congress enacted the Indian Tribal Governmental Tax Status Act of 1982, Public Law 97-473. This Act resolved the pre-existing ambiguity by making it clear that the excise tax exemption for state and local governments includes tribal governments. While the Act is not by its terms retroactive, does it nevertheless demonstrate that the lower courts erred by failing to recognize that the excise taxes in question were never intended to be imposed on tribal governments?

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OPINIONS OF THE COURTS AND AGENCY BELOW

By examination report and opinion dated October 31, 1978, the Internal Revenue Service assessed delinquent federal excise taxes against the Confederated Tribes in the sum of $52,904.55 for diesel fuel, propane, a truck chassis and the use of highway trucks, used by the Confederated Tribes in the tribal timber enterprise for tax periods from July 1, 1973, through December 31, 1977. The Confederated Tribes protested the assessment and filed refund claims totalling $8,592.50 for excise taxes which inadvertently had been paid. The IRS disallowed the protest and refund claim. The IRS opinion is printed in the Appendix, page A-1. The Confederated Tribes exhausted its administrative remedies through the IRS appellate division, and thereafter filed this action to set aside the delinquent excise tax assessment, and to obtain

a refund, on the grounds that the Confederated Tribes is exempt. The Tax Division of the Department of Justice, appearing on behalf of defendant Commissioner and the United States, sought judgment against the Confederated Tribes for the tax assessment plus interest from the date the taxes allegedly were incurred.

The Tax Division filed a motion for judgment on the pleadings, contending as a matter of law that the Confederated Tribes is not exempt. The Confederated Tribes filed a countermotion for summary judgment, with supporting affidavits from tribal officials and Bureau of Indian Affairs officials, seeking a determination that plaintiff is exempt.

The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, issued his opinion from the bench on July 17, 1981, denying the Confederated Tribes' motion for

summary judgment and granting defendants' motion for judgment on the pleadings. A transcript of the Honorable Judge Belloni's ruling is set forth in the Appendix. Judgment was entered in the District Court against plaintiff Tribes for unpaid excise taxes and interest, total $81,231.63, as of August 18, 1981, plus interest accruing thereafter. A true copy of the judgment is set out in the Appendix.

On October 29, 1982, the United States Court of Appeals for the Ninth Circuit issued its written opinion, published at 691 F2d 878, affirming the judgment of the District Court. A copy of the 9th Circuit opinion is printed in the Appendix.

SUPREME COURT JURISDICTION

The Ninth Circuit judgment to be reviewed was entered October 29, 1982, less than 90 days prior to the initial

filing of this petition. 28 USC §2101(c).

Jurisdiction is conferred on this Court by 28 USC §1254, which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree ..."

RELEVANT TREATY, STATUTES AND REGULATIONS

Article 4, Treaty With the Tribes of Middle Oregon, June 25, 1855, ratified March 8, 1859, 12 Stat 963:

> "In addition to the considerations specified the United States agree to erect, at suitable points on the reservation, one sawmill and one flouring-mill; suitable hospital buildings; one schoolhouse; one blacksmith-shop with a tin and a gunsmith-shop thereto attached; one wagon and plough maker shop; and for one sawyer, one miller, one superintendent of farming operations, a farmer, a physician, a schoolteacher, a blacksmith, and a wagon and plough maker, a dwelling house and the requisite outbuildings for each; and to purchase and to keep in repair for the time specified for furnishing employees all necessary millfixtures, mechanic's tools, medicines and

hospital stores, books and stationery for schools, and furniture for employees.

"The United States further engage to secure and pay for the services and subsistence, for the term of 15 years, of one farmer, one blacksmith, and one wagon and plough maker; and for the term of 20 years, for one physician, one sawyer, one miller, one superintendent of farming operations, and one school teacher."

The excise taxes in question were assessed under the following sections of the Internal Revenue Code of 1954 (26 USC):

§4041(a) "Diesel Fuel.--There is hereby imposed a tax of 4¢ a gallon upon any liquid (other than any product taxable under §4081)--

(1) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle . . ."

. . .

"(g) Other Exemptions.--Under regulations prescribed by the Secretary, no tax shall be imposed under this section--...

(2) with respect to the sale of any liquid for the exclusive use of any State, any political subdivision of a State, or the District of Columbia, or with respect to the use by any of the foregoing of any liquid as a fuel . . ."

§4061(a) "Trucks, Buses, Tractors, etc.--

(1) Tax imposed.-There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax of 10% of the price for which so sold, except that on and after October 1, 1984, the rate shall be 5%--
automobile truck chassis
automobile truck bodies . . . ."

§4221(a)- "General Rule.--
Under regulations prescribed by the Secretary, no tax shall be imposed under this chapter (other than under §4121) on the sale by the manufacturer of an article--. . .

(4) To a State or local government for the exclusive use of a State or local government . . ."

§4481(a) "Imposition of Tax.-- A tax is hereby imposed on the use of any highway motor vehicle which (together with the semi-trailers and trailers customarily used in connection with highway motor vehicles of the same type as such highway motor vehicles) has a taxable gross weight of more than 26,000 pounds, at the rate of $3 per year for each 1,000 pounds of taxable gross weight or fraction thereof . . ."

§4483(a) "State and Local Government Exemption.-- Under regulations prescribed by the Secretary, no tax shall be imposed by §4481 on the use of any highway motor vehicle by any

state or any political subdivision of a state."

Federal control and management of tribal timber resources is provided by the following sections of Title 25, USC:

25 USC §406:

"(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under §413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a Treaty obligation or amount to a taking of private property for public use without just compensation in violation of the Fifth Amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his

heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs."

25 USC §407:

"The timber on unallotted lands of an Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to §413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct."

25 USC §413:

"The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the costs of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees or assignees, or deducted from the proceeds of sale, leases or other sources of revenue: Provided, that the amounts so collected shall be covered into the treasury as miscellaneous receipts, except when the expenses of the work are paid from

> Indian tribal funds, in which event they shall be credited to such funds."

25 USC §466:

> "The secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units, on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range and like purposes."

Comprehensive regulations have been adopted by the Department of Interior, Bureau of Indian Affairs, to implement the foregoing Congressional mandates. The regulations are found at 25 CFR Parts 141-142.

The Indian Tribal Governmental Tax Status Act of 1982, Public Law 97-473, was adopted and became effective after the decision of the Ninth Circuit in this

case. The relevant portions of the Act for this case are as follows:

> "§7871. INDIAN TRIBAL GOVERNMENTS TREATED AS STATES FOR CERTAIN PURPOSES.
> "(a) General Rule--An Indian tribal government shall be treated as a state--
> . . .
> (2) Subject to subsection (b), for purposes of any exemption from, credit or refund of, or payment with respect to, an excise tax imposed by--
> (A) chapter 31 (relating to tax on special fuels),
> (B) chapter 32 (relating to manufacturers excise taxes)
> . . .
> (D) Subchapter D of chapter 36 (relating to tax on use of certain highway vehicles)
> . . .
> "(b) ADDITIONAL REQUIREMENTS FOR EXCISE TAX EXEMPTIONS--
> Paragraph (2) of subsection (a) shall apply with respect to any transaction only if, in addition to any other requirement of this title applicable to similar transactions involving a State or political subdivision thereof, the transaction involves the exercise of an essential governmental function of the Indian tribal government."

STATEMENT OF FACTS

These facts, set forth in affidavits filed in the District Court in support of

plaintiff's summary judgment motion, were uncontradicted.

The Confederated Tribes, a recognized treaty Indian tribe, occupies the Warm Springs Indian Reservation in Central Oregon. The Tribes' principal asset and source of revenue to finance tribal government and governmental operations is the timber located on the reservation. The Tribes owns and operates a sawmill enterprise known as Warm Springs Forest Products Industries, to process the timber into lumber, plywood and chips, primarily for sale on commercial markets.

The United States government, through the Department of Interior, Bureau of Indian Affairs, controls virtually all aspects of the tribal forestry operations under a complex framework of federal statutes and regulations. The timber is grown, managed, harvested and sold, and the proceeds distributed, by and under the

direct supervision and control of the United States government. The United States, through the BIA, determines the allowable annual cut and the stumpage price, thereby determining both the quantity of tribal timber which may be cut each year and the price received by the Tribes for that timber.

In setting the stumpage prices, the United States government, through the BIA, appraises the value of the timber, taking into account the logging costs, milling and processing costs, local conditions, species and condition of timber, profit and risk factors, support costs such as fire control, slash disposal, etc., and the administrative and overhead costs for both the United States and the Tribes. The timber is sold at the price set by the BIA, and the BIA then deducts up to 10% of the stumpage receipts to reimburse the United States for its management costs,

under federal statutes and regulations providing for these deductions, with the balance payable to the Tribes.

None of the BIA's management plans, harvest plans or stumpage value calculations for Warm Springs have made any specific allowance for federal excise taxes which the defendants now seek to impose on the vehicles, equipment, fuels and highway truck useage of the tribal sawmill in processing and marketing the tribal timber.

Revenues from the timber enterprises usually make up about 85% of the Tribes' annual budget. These budgets are developed by the Tribal Council according to the needs of the people, subject to BIA review and approval. The tribal budget finances tribal government and governmental services, such as, public safety, tribal police, tribal court, roads, utilities, health, land use and develop-

ment planning, salaries for tribal employees, and all other governmental services.

The tribal sawmill operates under a plan of operation developed by the Tribal council and the BIA, and approved by the BIA. The sawmill's annual budget, covering operating expenses, working capital and capital improvements, is part of the Tribal Council's overall annual budget which is subject to BIA review and approval. Neither the sawmill's annual budget nor the Tribal Council's overall budget have specifically made any allowances for the imposition of federal excise taxes on the fuels, trucks, equipment and highway use of the tribal sawmill.

BASIS OF FEDERAL COURT JURISDICTION

Jurisdiction in the court of first instance was founded upon 28 USC §1362 because plaintiff is an Indian tribe with a governing body duly recognized by the

Secretary of the Interior, and the matter in controversy arose under the Constitution, laws or treaties of the United States.

Jurisdiction was also founded upon 28 USC §1346(a)(1) because this was an action against the United States for the recovery of an Internal Revenue tax alleged to have been erroneously or illegally assessed.

Federal question jurisdiction was also present under 28 USC §1331(a) because the action was against the United States and an officer thereof in his official capacity, and the matter in controversy arose under the Constitution, laws or treaties of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

1. The courts below decided an important question of federal law which has not been, but should be, settled by this Court.

There do not appear to be any reported federal court decisions which

address the questions presented for review in this case.

Numerous reported decisions address the liability of individual Indians for federal and state taxes; however, there is very limited precedent, judicial or legislative, on the tax status of Indian tribes and tribal governments.

There is no reason to believe that Congress intended to collect excise taxes from Indian tribes and tribal governments, with whom Congress has a special treaty and trust relationship, while at the same time Congress exempted all other governmental entities. The lower courts erroneously ruled that the Tribes is subject to the excise taxes because Indian tribes were not mentioned in the governmental entity exemption, the lower courts saw no other basis for an implied exemption, and felt that only Congress, not the courts, could address the issue.

The omission of any mention of Indian tribal governments in the excise tax exemption for governmental entities may have been an oversight, but it certainly is no indication that Congress intended to tax tribal governments while exempting all others. That oversight has been corrected by the enactment of the Indian Tribal Governmental Tax Status Act of 1982, which makes it clear that the exemption for governmental entities includes tribal governments. However, a justiciable controversy still exists because of the judgment for $81,231.63 plus interest against plaintiff Tribes for excise taxes assessed through December 31, 1977, and the likelihood that the Internal Revenue Service, based on the opinions of the courts below in this case, may impose further excise tax assessments against plaintiff Tribes and other tribes similarly situated for tax periods prior

to the effective date of the Indian Tribal Governmental Tax Status Act of 1982.

2. The decisions of the courts below contravene tribal sovereignty, treaty obligations, the intent of Congress and established fundamental principles of Indian Law.

The imposition of federal excise or other taxes on Indian tribes can only be viewed as an infringement upon and partial abrogation of tribal sovereignty. The treaty was a grant of rights and powers by the Tribes to the United States, and is to be interpreted as the Tribes understood it. The Tribes reserved all rights and powers of sovereignty which were not expressly given up in the treaty or subsequently abrogated by express act of Congress. United States v. Winans, 198 US 371, 380, 49, LEd 1089 (1905). Accordingly, it is a fundamental principle of federal Indian law, based upon a proper respect for tribal sovereignty and the plenary authority of Congress in this

area, that a congressional intent to abrogate or infringe upon tribal sovereignty cannot be implied, but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 US 49, 58, 98 S Ct 1670, 56 LEd2d 106 (1978); Merrion v. Jicarilla Apache Tribe, ___ US ___, 102 S Ct 894, 71 LEd2d 21 (1982).

Prior to the 1982 amendments, Indian tribes and tribal governments were not mentioned in the excise tax sections or elsewhere in the Internal Revenue Code. If Congress had intended to collect excise taxes from tribal governments, Congress would have said so. Congressional silence on the issue of taxation of Indian tribes, in the treaty, in the Internal Revenue Code and elsewhere, means that tribes, as sovereigns, are not subject to federal excise taxes until Congress expressly directs otherwise. The lower courts erroneously ruled that until Congress

speaks, tribes are taxable. The proper rule is that tribes are not taxable unless Congress speaks, clearly and unambiguously, to make them taxable.

Extraction of federal excise taxes on the Tribes' means of production used in the tribal timber enterprise violates treaty obligations and the federal regulatory scheme for the management and production of tribal timber resources. White Mountain Apache Tribe v. Bracker, 448 US 136, 100 S Ct 2578, 65 LEd2d 665 (1980) contains a comprehensive discussion by this Court of the special trust relationship between the United States and treaty tribes, the pervasive federal management and control of tribal timber resources, and the federal purpose in promoting tribal economic development and self-sufficiency through the harvest and marketing of tribal timber resources. That opinion held that state excise taxes

on motor fuels, motor carriers, etc., could not be applied to non-Indian logging companies operating on the White Mountain Apache Reservation, cutting and hauling timber to the tribal sawmill. While that case involved state excise taxes, the Court's reasoning is equally applicable to the imposition of federal excise taxes:

> ". . .The federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. . .There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. . .At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive... the benefit of whatever profit (the forest) is capable of yielding. . .' 25 CFR §141.3(a)(3)(1979). . . . Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the federal government. . . . The imposition of the taxes at issue would undermine that policy in a context in which the federal government has undertaken to regulate the most minute details of timber

> production and expressed a firm desire that the tribe should retain the benefits derived from the harvesting and sale of reservation timber. . . ." 65 LEd2d at 676.

As shown by the affidavits reprinted in the Appendix, neither plaintiff Tribes nor the BIA officials in charge of timber operations at the Warm Springs Agency have made any specific allowance for federal excise taxes in the budgeting and financial planning for the Warm Springs timber enterprise.

In Squire v. Capoeman, 351 US 1, 76 S Ct 611, 100 LEd 883 (1956), the government took the position that an individual Indian's income from the sale of timber grown on his restricted allotment was subject to federal capital gains tax because there was no express exemption in the Internal Revenue Code. This Court rejected that narrow, overly technical approach, and made clear that Indian tax exemptions may be found by implication

from sources outside the Revenue Code, because "...it is not likely to be assumed that Congress intended to tax the ward for the benefit of the guardian." 351 US 8. It should never be presumed that Congress intended to tax the tribe itself, as distinguished from individual Indians, in the absence of a clear expression of Congressional intent. The lower courts gave insufficient recognition to this principle.

The decision of the Ninth Circuit is in conflict with a Tenth Circuit opinion, Donovan v. Navaho Forest Products Industries and Occupational Safety and Health Review Commission, 691 F2d 878 (1982), with respect to the applicable principles of tribal sovereignty and the clarity of Congressional intent which will be required before statutes of general application will be applied to Indian tribal governments. The Donovan case,

decided November 8, 1982, held that the Occupational Safety and Health Act of 1970 (OSHA) did not apply to Navaho Forest Products Industries, a Navaho tribal business enterprise on the Navaho reservation, an instrumentality of the tribal government. The basis for the holding was that there was no legislative intent in OSHA to abrogate the Navaho treaty by application of the Act to the Navaho tribe. The Tenth Circuit correctly recognized that application of OSHA to the Navaho tribal enterprise would dilute principles of tribal sovereignty and self-government recognized in the treaty, and refused to permit that result to occur absent a clear expression of Congressional intent.

From what source would the IRS collect the excise taxes? Would the IRS seize the diesel trucks, mill fixtures, and other tribal property used in the

timber operation, thereby disrupting or shutting down the federally managed timber operations? Or, would the IRS seize or garnish the proceeds of federally controlled timber sales, thereby confiscating funds which Congress has expressly directed to be paid by the United States to or for the benefit of the Tribes, subject only to such deductions for federal expenses as Congress has expressly authorized? By what clear, unambiguous Congressional authority has the Internal Revenue Service proceeded in this case?

Petitioner The Confederated Tribes respectfully requests the Court to grant the Writ.

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